IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No.

JAMES ORVILLE COUCHOIS,

Petitioner,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction

The facts with regard to jurisdiction are set forth in the foregoing petition.

Statement of the Case

The basic facts have been set forth in the foregoing petition. However, there are many other facts to which the Court's attention should be called. These will be discussed in connection with the argument.

SUMMARY OF ARGUMENT

POINT I

Petitioner was denied effective representation by counsel in violation of the Sixth Amendment.

In considering the sufficiency of the representation by counsel which was afforded petitioner in this case, it is necessary to have in mind certain essential facts. Petitioner was a resident of Detroit, Michigan (R. 62, 64). He was tried in Mobile, Alabama, on a charge of having committed a crime on the high seas (R. 4, 5). The trial took place in Mobile only because of the accident that the ship on which petitioner was serving put into the port of Mobile (R. 42). None of the witnesses were residents of Mobile.

Petitioner, before he became a merchant seaman, had been in the Navy (R. 62). He joined the Merchant Marine shortly after the United States entered the war (R. 64) and obtained a job in New York on the steamship "West Nohno" (R. 65). This vessel left New York in May, 1942, and returned again to the United States in February, 1943 (R. 33). It was after this return at Mobile that defendant was charged with the offense of sedition (R. 12).

The indictment charged in two counts that defendant in conversation with various members of the Navy or the crew of the vessel said that they were foolish for enlisting in the Navy, that they could have made more money otherwise, that it didn't make any difference who won the war, and that the war was between a bunch of crooks (R. 4-6). The first count of the indictment charged that these statements were made in order to cause insubordination in the armed forces (R. 4), the second count that the statements were made in order to obstruct recruiting (R. 5).

The indictment was found on March 17, 1943 (R. 6). It does not expressly appear in the record when petitioner

was arraigned or when he was released on bail. It does appear, however, that when the case was first set for trial petitioner went from Detroit to Mobile (R. 15). The case was adjourned at that time on the request of the District Attorney (R. 15).

Petitioner had in the meantime made some efforts to obtain an attorney. He communicated with Mr. Joseph Curran, the president of his union, and was informed by Mr. Curran that the union would furnish a lawyer and see that the witnesses he needed were present (R. 14). Petitioner gave the names of the witnesses to Mr. Curran (R. 14). Petitioner also conferred with the clerk of the Court and the District Attorney with regard to the subpoenaing of witnesses and was informed that the government would not bring the witnesses to Mobile because they were more than 100 miles distant (R. 13, 15). Petitioner also gave a list of his prospective witnesses to some agents of the Federal Bureau of Investigation, who offered their services to help locate the witnesses (R. 15).

When the case was finally set for August 2, 1943, petitioner wrote the Judge asking for an adjournment, and was informed that since the jury had already been called the request was too late (R. 16). Accordingly, petitioner went from his home in Detroit to Mobile and wired his union inquiring about counsel (R. 16). When the case was called petitioner was without a lawyer (R. 16, 31).

The Trial Court then appointed Mr. Samuel W. Pipes III, a gentleman whom petitioner had never seen (R. 16). Mr. Pipes filed an affidavit in support of the motion for new trial in which he stated that he arrived at court around 11 o'clock in response to a telephone call from the judge (R. 18). Being informed by petitioner that there were absent witnesses, Mr. Pipes asked the Court to grant a short continuance to enable him to confer with defendant, prepare the case and, if possible, obtain the attendance of these witnesses (R. 18, 32). The Court refused the request for adjournment but recessed from 11.30 A. M. to 2.30 P. M. (R. 32).

Mr. Pipes had never previously had any experience in sedition cases (R. 19). He was thus required to familiarize himself with the law appertaining to such cases in such brief time as he could spare while court was not in session and while he was not occupied with his other practice. The Court sat from 9.30 in the morning until 5, sometimes 6 o'clock at night (R. 19). As Mr. Pipes pointed out in his affidavit there were many things about the nature of the case which he was not able to find out except as they were developed from witnesses. Mr. Pipes also called attention to possible prejudice done to petitioner by the non-availability of two books to which some of the witnesses referred (R. 20).

An examination of the bill of exceptions leaves considerable doubt both about the guilt of defendant and the effectiveness with which his interests were protected at the trial. Much evidence appears to have been received without objection which was highly prejudicial to petitioner. This is particularly true of the testimony of Lieutenant Commander Meek (R. 42-45) and that of Lieutenant (formerly Ensign) Carter (R. 46-51). Both of these witnesses were allowed to testify with regard to their opinions. The Lieutenant Commander was permitted to make various prejudicial statements concerning petitioner, none of which had any relevance to the charges (see R. 42, 43). Carter gave the impression that petitioner was a Communist (R. 46, 47), which was not the fact (R. 57, 74), and which was also wholly irrelevant to the prosecution. It should be noted, moreover, that the statements attributed to petitioner were made on a voyage which began in 1942 (R. 33), thus long after the Communist attitude toward the war had become one of the fullest co-operation (see R. 57).

It is perfectly apparent that petitioner had aroused antagonism on board the ship because of the manner in which he acted as the deck delegate. Petitioner had objected to various activities required of the members of the crew, and also had objected to members of the naval

gun crew being taught things which petitioner thought should be done only by members of the ship's crew (R. 42, 43). To what extent these difficulties colored the testimony against petitioner and to what extent they may have influenced the jury, it is, of course, impossible to say.

The case is further complicated by the fact that petitioner claims that the various statements attributed to him were not statements made by him at all, but quotations from various books which were on board ship (R. 75, 77), books it was not possible for petitioner to produce at the trial (R. 20).

Several members of the armed guard and one member of the ship's crew testified with regard to conversations which they had at various times with defendant. Defendant's case consisted of his own testimony and a stipulation to the effect that certain members of the crew would, if present, have testified that they never heard petitioner make any of the statements he was accused of having made (R. 60, 61).

It is obvious, of course, that no such stipulation could be of much value to petitioner. No one can say what the result of the trial might have been had some of the members of the crew been present to throw light on the situation on board ship and the real reason for bringing up these charges against petitioner. It must not be forgotten that these charges were belated ones, since petitioner was originally charged merely with having brought an obscene book into the country, a charge which was never pressed (R. 11, 12).

It is significant, moreover, that petitioner was charged with sedition for casual statements made in private conversations at undefined periods on a nine months' cruise. It is inconceivable that such matter could properly form the basis of a charge of sedition within the clear and present danger rule as laid down by this Court in *Schenck* v. *United States,* 249 U. S. 47, and just reaffirmed in *Hartzel* v. *United States* (decided June 12, 1944). The record contains no indication that petitioner's assigned counsel was

cognizant of this rule or made any attempt to have it applied to the prosecution. No motion appears to have been made to dismiss at the end of the government's case or for a directed verdict at the end of the entire case (see R. 60, 85, 86). Such a motion should have been made on other grounds also.

Petitioner was charged in the first count with attempting to cause insubordination in the armed forces by statements made to various members of the gun crew (R. 4). The primary duty of that crew was, of course, to protect the ship and its personnel in case of attack. Is there any rational basis for supposing that petitioner cared so little for his own safety that he sought to dissuade these members of the gun crew from doing their duty? Is it not more likely that petitioner was just airing his opinions because he was that kind of person and that there is no basis for a contention that he intended to violate the law? At any rate such a contention should have been presented by a motion to dismiss the first count.

Moreover, there is good ground for contending that the conviction under the second count was also not justified by the evidence. This count charged an attempt to obstruct recruiting (R. 5). The statements attributed to petitioner were, with one exception (Ryan, R. 52-58), all made to persons already in the Navy (R. 33, 35, 37, 39, 40, 58). By no stretch of the imagination could they have had the effect of obstructing recruiting (see *Hartzel* v. *United States*, decided June 12, 1944). The case against petitioner under the second count rested, therefore, only on conversations with Ryan. There is nothing in his testimony (R. 53, 54) to indicate that petitioner made the remarks attributed to him in the presence of any third persons. Is it possible that a person can be convicted of attempting to obstruct recruiting because of a single private conversation? In any case a motion to dismiss should have been made to raise this point. The absence of such motion was relied on by the Circuit Court in summarily rejecting the contention that the evidence did not sustain the verdict.

The Judge's charge is not contained in the record. It is impossible, therefore, to determine whether it adequately protected petitioner's rights and what, if any, exceptions were or should have been taken to it by petitioner's assigned counsel.

The character of the record is affected by the circumstance that no court reporter attended the trial. While this fact does not appear on the face of the record, it was stated in petitioner's brief in the Circuit Court and was not challenged in any way by the government. The bill of exceptions, moreover, gives some indication that it was prepared on the basis of memory and not from stenographer's minutes (see the conflicting statements with regard to part of the evidence of the witness Ryan—R. 55).

The Circuit Court in its opinion ignored many of the details which we have recited. It treated the case very much as though petitioner's counsel had been chosen by himself, citing *Chastain* v. *United States,* 138 F. (2d) 413. We submit that the Circuit Court proceeded from a false start. Of course, if a person charged with crime has selected a lawyer and that lawyer fails properly to protect the defendant's interests and has not adequately prepared the case, the defendant cannot complain that his constitutional rights have been denied because an adjournment has been refused. Altogether different, however, is the situation where a defendant is without a lawyer.

Even if it be urged that there is any duty on the part of a person accused with crime to get a lawyer for himself, it appears here that petitioner had made various efforts to obtain such a lawyer and, until the last moment, had expected that the union, of which he was a member, would supply a lawyer.

It appears, morever, that the Circuit Court treated the case as though the only question were whether or not the trial had been a fair one, citing *Powell* v. *Alabama,* 287 U. S. 45; *Avery* v. *Alabama,* 308 U. S. 444, and *Neufield* v. *United States,* 118 F. (2d) 375. We submit that the Circuit Court confused the rule applicable to the review

of Federal convictions with that applicable to State convictions in stressing this question of a fair trial. As this Court pointed out in *Betts* v. *Brady,* 316 U. S. 455, the requirement of the Fourteenth Amendment with regard to due process is not as specific and rigorous as is the command of the Sixth Amendment with regard to representation by counsel. State action amounts to a deprivation of constitutional right only where it is apparent that an unfair trial resulted. The command of the Sixth Amendment, however, is absolute so that a conviction cannot stand where this command has been ignored, regardless of the possible guilt of the defendant or the fairness of the trial. See *Johnson* v. *Zerbst,* 304 U. S. 458.

And in *Glasser* v. *United States,* 315 U. S. 60, this Court reversed the conviction of one of a group of defendants in a Federal court because he was assigned a lawyer also representing a defendant whose situation in the case was hostile to that of the appellant. In that case this Court said:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculation as to the amount of prejudice arising from its denial."

The cases relied upon by the Circuit Court do not, we submit, sustain its conclusion. In the *Powell* case, of course, this Court reversed convictions because of the ineffective representation by counsel. While there are differences between this case and that, both in the nature of the crime and the character of the accused, still the similarities are many. In both cases the trial was distant from the residence of the accused, in both cases assigned counsel had no opportunity properly to confer with the accused, in both cases no witnesses were obtained to support the contention of the accused.

The *Avery* case, on the other hand, was quite different. In the first place, the trial did not begin on the day on which counsel were assigned, but on several days thereafter. In the second place, the trial took place in a rural county where the crime had been committed and where all the witnesses were readily available. In the case at bar the trial took place in Mobile where the alleged crime had not been committed, where none of the witnesses or the accused had ever lived. This Court sustained the conviction in the *Avery* case because it felt that everything possible had been done by assigned counsel. An examination of the record in the case at bar permits no such conclusion, but on the contrary indicates clearly that assigned counsel failed to do many things which he might have done and permitted much evidence to go in which should have been objected to. And, of course, in reaching that conclusion in the *Avery* case this Court was motivated by the fact that it was a State case, so that the due process clause, not the Sixth Amendment, was in question.

The other case cited by the Circuit Court, *Neufield* v. *United States,* 118 F. (2d) 375, is in no way apposite. For in that case one of the defendants had employed a lawyer several months before the trial and this lawyer had assisted counsel assigned to the other defendant.

In contrast with the attitude of the Circuit Court in this case should be set that of the Court of Appeals of New York in *People* v. *McLaughlin,* 291 N. Y. 480. There, as here, the trial took place many months after the indictment. There, as here, the defendant was without counsel when the case was called for trial. Counsel was assigned late in the morning. The trial started at 2 o'clock. The Court of Appeals reversed the conviction so obtained, saying with regard to the right to counsel:

> "This fundamental right is denied to a defendant unless he gets reasonable time and a fair opportunity to secure counsel of his own choosing and with that counsel's assistance, to prepare for trial; no last min-

> ute peremptory assignment of counsel will serve, particularly when made at such a time and under such circumstances as practically to preclude the giving by counsel to prisoner and prisoner to counsel, of effective aid in the preparation of the case."

Other State courts have reached like conclusion in cases not unsimilar. Many of the cases are collected in this Court's opinion in the *Powell* case at page 58. In addition, see *People* v. *Shiffman*, 350 Ill. 243, and *State* v. *Farrell*, 223 N. C. 321.

It appears, therefore, that the decision of the Court below is at variance with decisions by this Court and decisions of State courts of last resort on an important question of constitutional right.

CONCLUSION

It is respectfully submitted that this is a case meriting the intervention of this Court and that the writ of certiorari prayed for should be granted.

Respectfully submitted,

OSMOND K. FRAENKEL,
Counsel for Petitioner.